

**MARCUS ROBERTSON
AND ASSOCIATES-ARCHITECTS****CONTRACT NO. V544P-3300****VABCA4452****VA MEDICAL CENTER
DENVER, COLORADO**

Marcus Robertson, Marcus Robertson and Associates-Architects, Denver, Colorado, for the Appellant.

Dennis C. Bolte, Esq., Government Trial Attorney, Denver, Colorado; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
INTRODUCTION**

By its Motion for Summary Judgment, dated March 31, 1995, Respondent, Department of Veterans Affairs ("VA" or "Government") moves for the summary denial of this appeal. This appeal results from the VA Contracting Officer's ("CO") final decision denying Marcus Robertson and Associates - Architects' ("Appellant" or "MRA") \$3,428 equitable adjustment claim for preparation of specifications under its Contract No. V544P-3300 ("Contract") for the design of patio enclosures for the Nursing Home Care Unit and Mental Health Clinic at the VA Medical Center in Denver, Colorado ("VAMC Denver").

The VA asserts that: 1) the Contract executed by the CO required MRA to "develop a complete set of drawings and specifications for bidding purposes" for the enclosure of the patios at VAMC Denver; and, 2) that the VA, as agreed in the negotiations with MRA, provided MRA with computer diskettes of the VA "Master Specifications" from which the specifications for the project could be prepared. The VA, asserting that since these and any other facts material to the appeal are undisputed, avers that it is entitled to a judgment denying this appeal as a matter of law.

MRA entered its opposition to the VA's Motion in the form of a letter taking issue with several of the "Undisputed Facts" asserted by the VA in its brief supporting the Motion. Among the factual "discrepancies" noted by MRA in the undisputed facts are the terms of the Contract executed by the VA and MRA. MRA asserts that the Contract, as executed by the parties, reflects their agreement that the VA would provide the specifications for the patio enclosure. These terms, according to MRA, reflect the agreement of the parties reached in their negotiation of the Contract price relative to the effort to be expended by MRA in preparing the project specifications.

The record before the Board consists of the Complaint and Answer (cited as "Cmplnt. ¶ ___" or "Answr. ¶ ___"), the Appeal File (cited as "R4, tab ___") consisting of 46 exhibits submitted by the VA, the VA's Motion for Summary Judgment (cited as "MSJ ¶ ___") supported by the Affidavits of Ms. Willia L. Tribble, the CO, (cited as "Tribble Aff. ¶ ___") to which is attached "Exhibit A", a copy of the Contract allegedly as executed by the parties and Mr. David A. Rossi, VAMC Denver Project Engineer (cited as "Rossi Aff. ¶

___"), MRA's April 20, 1995 letter opposing the Motion (cited as "MSJ Opp. ¶ ___") to which is attached a copy of the Contract allegedly as executed by the parties, and the VA's Reply to MRA's Opposition (cited as "MSJ Rply. p. ___").

For purposes of our consideration of the VA's Motion, the relevant facts are as follows. The record before us contains four copies of the Contract. The first copy received into the record was the copy submitted by the VA as part of the Appeal File (R4, tab 13). MRA submitted the second copy of the Contract received into the record with its Complaint. The third and fourth copies of the Contract entered into the record are the attachment to the CO's affidavit in support of the VA's Motion and the copy submitted by MRA in its response opposing the Motion. Not surprisingly, the two copies of the Contract submitted by the VA appear to be identical to each other as are the two submitted by MRA. However, the VA's and MRA's copies differ significantly in their terms relating to the preparation of specifications.

As submitted by both parties, the Contract consists of a Standard Form 262, "Architect-Engineer Contract" showing a Contract date of March 10, 1994 and executed by Mr. Robertson on behalf of MRA and Ms. Tribble on behalf of the VA, the standard Representations and Certifications and General Provisions found in VA A/E contracts, Special Provisions, an A/E Contract Procedures section and Attachments. Each version of the Contract consists of 61 consecutively numbered pages and each version appears, in the most part, to be in printed form. The difference in the two versions of the Contract is found in the Attachments section of the Contract (at 49-61).

As submitted by the Government, Paragraph (a) of the "Schedule of Payments for A/E Contracts" Attachment (at 51) is a 21 line paragraph detailing the manner in which payments would be made under the Contract. In the version of the Contract submitted by MRA, a sentence, obviously typewritten in different typeface and shading than the printed form of the rest of the Contract, is added to the end of Paragraph (a) stating "All specifications by Owner per the A/E Proposal."

In the "Project Scope of Work" Attachment (at 53), the VA version of the Contract states:

The A/E shall develop a complete set of drawings and specifications for bidding purposes.

MRA's Contract contains an additional phrase at the end of the paragraph stating "Specifications by Owner."

Finally, the "Project Submission of Working Drawings (95%)" Attachment to the Contract (p. 58), as submitted by MRA, in Paragraph C., *Specifications* adds the following additional typewritten sentence to the printed format as follows:

Owner to provide the basic specifications and the A/E will just organize them for bidding.

DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Saturn Construction Company***, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd.*, 991 F.2d 810 (Fed. Cir. 1993) (Table). The moving party carries the burden of showing that there is no genuine issue of material fact; all doubts over whether a genuine factual dispute exists will be resolved in favor of the nonmovant. ***Saturn, supra.***; ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323 (1986).

A nonmovant may not establish the existence of a genuine, triable issue of material fact simply by challenging a fact or by an unsupported conclusion. The nonmovant must present sufficient evidence, by pointing to some part of the record or additional evidence, indicating that the facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the nonmovant, could decide in favor of the nonmovant. ***Fire Security Systems, Inc.***, VABCA No. 3086, 90-3 BCA ¶ 23,235; ***Hengel Associates***, VABCA No. 3921, 94-3 BCA ¶ 27,080; ***C. Sanchez and Son, Inc.***, 6 F.3d 1539 (Fed. Cir. 1993).

In this case, MRA takes issue with the VA's assertion that the Contract terms are undisputed or that the Contract required MRA to prepare the project specifications. MRA supports its position with a copy of the Contract it alleges is the only version it ever executed. Under the above standard, the Board, drawing all inferences in favor of MRA and accepting its version of the Contract terms, could reasonably conclude that MRA's preparation of the project specifications as directed by the VA was a Contract change for which MRA would be entitled to an equitable adjustment.

In its Reply to MRA's Response in opposition to the Motion, the VA reiterates its original assertions, particularly that the CO never executed the version of the Contract put forward by MRA. The VA further asserts that, even if MRA's version of the Contract was the one executed by the parties, MRA was still obligated under the Contract to develop a complete bidding package of drawings and specifications developed in accordance with Contract requirements. As we understand its position, the VA is asking the Board to find that the determination of whether the VA's or MRA's version of the Contract is correct is not material to the resolution of this appeal and that the VA is entitled to judgment as a matter of law. The issue of whether MRA had to prepare a complete bidding package is not in dispute in this appeal. The dispute here centers on whether the VA obligated itself in the Contract to provide one component of the package, the specifications, to MRA for integration into the bidding package. The VA cannot restate the nature of the dispute to its advantage so as to reap the benefit of a summary disposition of this matter in its favor. We also note that, in its Reply, the VA provides no legal or additional undisputed evidence to buttress its interpretation that it is entitled to summary judgment under the MRA version of the Contract. Thus, we will not further consider this assertion since it is neither relevant to this appeal nor properly supported.

Ordinarily, interpretation of the terms of a Contract is a question of law that can properly be disposed of in a summary judgment motion. However, since, under the standards discussed above, MRA has successfully placed in contention the issue of the terms of the Contract, the VA, in effect, is asking us to weigh the evidence and determine which version of the Contract is correct. In reaching a summary judgment decision, the Board's role is not to weigh the evidence. Our role is to determine whether a genuine

triable issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

We can think of no fact more material to the outcome of this appeal than the terms of the parties' Contract. Since MRA has sufficiently shown that there is a genuine issue of exactly what those terms are, summary judgment is not available.

DECISION

For the foregoing reasons, the VA's Motion For Summary Judgment in the appeal of Marcus Robertson and Associates, VABCA No. 4452, under Contract No. V544P-3300 is **DENIED**. The Board will contact the parties with regard to scheduling further proceedings in this appeal.

DATE: **May 31, 1995**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge